IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-1068

RETHELL BYRD CHANDLER, etc., et al.,

Petitioners,

v.

GEICO INDEMNITY COMPANY,

Respondent.

RESPONDENT GEICO'S BRIEF ON JURISDICTION

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INTRODUCTION

This Respondent's brief is filed in opposition to Petitioners' plea for discretionary review following entry of a unanimous decision by the First District Court of Appeal. The Petitioners in this case, Rethell Byrd Chandler, as Mother and natural Guardian of Jamelia A. Chandler, a minor, Carolyn E. Price, individually and on behalf of her minor child Christeegia A. Price, and Linda Jean Parker, as Personal Representative of the Estate of Camiela Y. Byrd, Whitney Marshall and Tenisha Marshall, were Appellees in the district court of appeal and defendants in the circuit court.[1] The Respondent, Geico Indemnity Company ("GEICO"), was the Appellant in the district court of appeal and the plaintiff in the circuit court declaratory judgment action.

STATEMENT OF THE FACTS

The facts, as taken from the First District decision are as follows.

GEICO brought a declaratory judgement action to establish that there was no coverage under a family automobile insurance policy it issued to Kutasha Shazier. (A. 2, 4). Shazier carried GEICO coverage on a Ford Expedition she owned. (A. 2). When the Ford Expedition began experiencing transmission

[1] Co-defendant, Monica Steele, filed a similar Notice to Invoke that is pending under Case No. SC10-1070. Petitioners have not moved to consolidate the cases.

problems, Shazier rented a Hyundai Sonata from Avis Rent-A-Car. (A. 3).

Petitioners moved for summary judgment on the ground that coverage existed because the rental car qualified as a "temporary substitute auto." (A. 4). GEICO filed its own summary judgment motion asserting that no coverage existed because the rental car did not qualify as a "temporary substitute auto" as it was not being used with Avis's permission.[2] (A. 4).

Avis, as the owner of the vehicle, limited permission to use of the vehicle as set forth in the rental agreement. (A. 3). Shazier was the only person authorized to drive the rental car. (A. 3). At the time of the accident, Tercina Jordan, an unauthorized driver, was driving the rental car. (A. 3). Petitioners brought personal injury actions against Shazier, Jordan and Avis. (A. 4).

The trial court entered summary judgment in favor of Petitioners. (A. 2). In its well-reasoned opinion, the First District reversed and held that the rental car did not qualify as a "temporary substitute auto." (A. 4-5).

> Under the policy, in order for coverage to attach in this case, the "temporary substitute auto" must have been

[2] The "temporary substitute auto" provision contains two conditions. Because the district court found that the first condition was not met – used with the permission of the owner – it did not reach the question of whether the owned vehicle was withdrawn from normal use for breakdown or repair. The status of the Ford Expedition was contested and was an unresolved material fact that likewise precluded the summary judgment entered by the trial court.

> used with the permission of Avis. As the owner, Avis had the authority to define the scope of permissible use of the rental car. See Duncan Auto Realty, Ltd. v. Allstate Ins. Co., 754 So.2d 863, 865 (Fla. 3d DCA 2000) ("[T]he owner of the temporary substitute vehicle, not its user, possesses the authority to define the scope of permissible use of the substitute vehicle."). As evidenced by the rental agreement, Avis did just that. Avis granted Shazier permission to use the rental car so long as she was the only person who did so. Jordan's use of the rental car automatically revoked the permission granted to Shazier by Avis. Therefore, because it was not being used with Avis's permission, the rental car did not qualify as a "temporary substitute auto" and no coverage existed under the policy.

(A. 4-5).

Accordingly, the district court reversed and remanded with directions that summary judgment be entered in favor of GEICO. (A. 5).

SUMMARY OF THE ARGUMENT

As demonstrated in the legal arguments that follow, no express and direct conflict exists and, therefore, this Court should decline the invitation to exercise discretionary jurisdiction. A decision exhibits express and direct conflict with another if it announces a conflicting rule of law or, by application of a rule of law to substantially similar facts, produces a conflicting result. This case turns on the interpretation of a contractual provision defining "temporary substitute auto." The case cited by Petitioners for conflict jurisdiction does not involve a question of

insurance contract interpretation, nor the term "temporary substitute auto." The district court decision not only followed the law regarding contract interpretation, but followed the existing precedent addressing the very issue presented.

ARGUMENT

THIS COURT LACKS JURISDICTION TO ENTERTAIN THIS CASE AS THERE IS NO EXPRESS AND DIRECT CONFLICT WITH *Roth v. Old Republic Ins. Co.*, 269 So. 2d 3 (Fla. 1972)

This Court should decline to exercise discretionary conflict jurisdiction under Art. V, §3(b)(3) of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(iv), because the necessary "express and direct" conflict does not exist. Conflict review is limited to direct conflicts in the law out of concern for uniformity in decisions as precedent rather than the adjudication of the rights of particular litigants. *Mystan Marine, Inc. v. Harrington*, 339 So. 2d 200, 201 (Fla. 1976). The necessary conflict "must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). Moreover, where there is a factual difference between allegedly conflicting cases, jurisdiction will not lie. *Department of Revenue v. Johnston*, 442 So. 2d 950, 950 (Fla. 1983). These requirements are interpreted restrictively to limit the Court's jurisdiction to those cases where the conflict is express and not implied. *Jenkins v. State*, 385 So.

2d 1356, 1359 (Fla. 1980).

Petitioners contend that the decision below expressly and directly conflicts with:

Roth v. Old Republic Ins. Co., 269 So. 2d 3 (Fla. 1972).

No such conflict exists. The *Roth* case was neither argued in any of Petitioners' First District briefs nor cited in the First District's decision. *Roth* was not argued below because *Roth* does not apply to the contract interpretation question that faced the First District. Petitioners erroneously raise *Roth* at this late stage because of a clear misunderstanding of the law.

Petitioners are overlapping and confusing two separate legal concepts. First, the law of contracts, which is governed by rules of interpretation that seek to apply the clear language of the contract. Second, Florida's dangerous instrumentality law, which imposes vicarious liability on the owner of a dangerous instrumentality for the entrustment of a motor vehicle to another. Where there is no overlap of the two concepts, a court will not interfere with application of an insurance policy's contractual terms. *See Kobetitsch v. American Mfrs.' Mut. Ins. Co.*, 390 So. 2d 76, 77 (Fla. 3d DCA 1980) ("an original entrustment which would impose tort liability on the employer, does not - as a matter either of public policy or of the proper construction of the [permissive use] clause in question - alone

constitute the 'permission' to operate required by the insurance policy," *citing Ball v. Inland Mut. Ins. Co.*, 121 So. 2d 470 (Fla. 3d DCA 1960)); *see also Winters v. Phillips*, 234 So. 2d 716 (Fla. 3d DCA), *cert. denied*, 238 So. 2d 424 (Fla. 1970). There is no overlap of the two concepts in this case .

Unlike *Roth*, the instant case does not involve a question of a car rental agency's liability to an injured claimant. There is no attempt in this case to avoid Florida's dangerous instrumentality law or the accompanying public policy that the vehicle owner's insurance provides the primary layer of coverage. This case is limited to interpretation of the policy of automobile insurance issued to the renter, Shazier.

Roth involved the adjudication of indemnity and restitution claims among multiple insurance carriers to determine whether the rental agency's insurance policy would answer for the primary layer of coverage available to pay the claim brought by a claimant injured by a rental vehicle. As an analysis of *Roth* reveals, the issues in *Roth* have nothing to do with the instant case either procedurally or factually.

The facts underlying *Roth* involved a bailment from a car rental agency (Yellow Rent-A-Car) ,to a lessee (Plax), and to an unauthorized permittee (Roth), all three of which carried automobile liability insurance. 269 So. 2d at 4. In *Roth*,

the unauthorized driver, Roth, carried automobile insurance with State Farm. *Id*. Roth was sued as a result of his use of the rental car and State Farm settled the underlying negligence action pursuant to its policy, with the approval of all parties, without prejudice to a judicial determination of the rights and liabilities of the three insurance carriers to indemnity or restitution. *Id*.

The legal issue determined by this Court in *Roth* is that the unauthorized driver is protected from an indemnity claim by the vehicle owner up to the primary limits of the owner's liability insurance policy. *Id.* at 5-6. This holding is based upon the liability imposed on a vehicle owner by the dangerous instrumentality law to answer for the statutorily mandated primary layer of insurance coverage under the financial responsibility laws. *Id.*[3] In *Roth*, the rental car agency's legal obligation could not be circumvented by a provision in the car rental agreement restricting the use of the vehicle to the renter, Plax. *Id.* at 7. Contrary to Petitioner's assertion, this Court did not impose any liability on North River Insurance Company, the insurer of the lessee, Plax, or determine whether the restrictive use provision would apply to interpretation of the North River policy.

[3] *Citing Susco Car Rental System of Florida v. Leonard*, 112 So. 2d 832 (Fla. 1959) (holding, without reference to the existence of any insurance policies, that a car rental company is vicariously liable under the dangerous instrumentality doctrine).

Accordingly, there is no conflict between the instant case and *Roth* because the two cases do not involve application of the same point of law and the controlling facts are different.

There are no statutory provisions or public policy principles that require automobile insurance to extend coverage to a "temporary substitute auto." *See Pastori v. Commercial Union Ins. Co.*, 473 So. 2d 40 (Fla. 3d DCA 1985). However, to the extent that GEICO's policy provided coverage for a "temporary substitute auto," the First District properly followed *Duncan Auto Realty, Ltd. v. Allstate Ins. Co.*, 754 So. 2d 863, 865 (Fla. 3d DCA 2000), in deciding the scope of insurance coverage.

CONCLUSION

Based upon the foregoing facts and legal authorities, the challenged decision neither expressly nor directly conflicts with the *Roth* decision. Accordingly, the Court lacks jurisdiction for discretionary review of the First District's decision.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being furnished by U.S. Mail on this _____ day of June, 2010 to all counsel on the service list below.

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CERTIFICATE OF COMPLIANCE

In compliance with Florida Rule of Appellate Procedure 9.210(2), counsel for Appellants certifies that the size and style of type used in this Brief are 14 point type, Times New Roman.

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